COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP424 **Cir. Ct. No. 2005CF117**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TEREZ LAMAR COOK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Terez Cook appeals an order denying his "motion for entry of written order denying motion for new trial in the interest of justice." Cook seeks entry of the order to facilitate an appeal from the circuit court's 2010 oral rulings rejecting Cook's motions for a new trial in the interest of justice and based on newly discovered evidence. Because the circuit court already entered an

order disposing of Cook's postconviction motions and lacks authority to enter another order disposing of these motions, and because the proposed new appeal would be procedurally barred and is meritless, we affirm the order.

¶2 Cook was convicted of numerous crimes arising out of an armed home invasion. After this court affirmed the convictions, Cook filed a series of postconviction motions requesting a new trial based on ineffective assistance of trial counsel, newly discovered evidence, and in the interest of justice. The circuit court held evidentiary hearings on these motions over four days in 2010. Based on ***State v. Henley***, 2010 WI 97, ¶¶39, 52, 65-76, 328 Wis. 2d 544, 787 N.W.2d 350, the court rejected Cook's request for a new trial in the interest of justice because WIS. STAT. §§ 805.15(1) and 806.07[1] do not apply in criminal cases and the circuit court lacks inherent authority to grant a new trial under these circumstances.

¶3 The court also rejected Cook's claim of newly discovered evidence consisting of identification of the DNA found on a glove in the perpetrators' car. The DNA was matched with Mykell Jackson. Cook's accomplices bought two pairs of gloves and other merchandise used in the home invasion at a WalMart shortly before the crimes took place. Two perpetrators entered the residence wearing those gloves. A thorough investigation of the glove found in the perpetrators' car conclusively showed it was not one of the gloves purchased at WalMart. Therefore, Cook was unable to show any connection between that glove with Jackson's DNA and the crimes. At a postconviction hearing, one of the women who was a party to the crimes testified she did not know Jackson and could not identify him on sight. Jackson also testified at a postconviction hearing,

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

denying that he knew any of the participants in the crime or that he had ever been to the county where the home invasion took place. He said he did not know how his DNA might have gotten on the glove, but stated he worked fixing houses and doing odd jobs in Milwaukee and wore "all types of gloves" while doing so. Cook's counsel conceded he could find no way to argue with the detective's investigation of that glove and stated, "I don't see that it leads anywhere of interest." The court responded, "I agree with you."

¶4 The court subsequently ruled that Cook was denied effective assistance of trial counsel. The court entered an order on November 10, 2010, specifically referring to its reasoning contained in the transcripts of the postconviction hearings, and granting Cook's motion for a new trial. This court reversed that order and the Wisconsin Supreme Court denied Cook's petition for review. Cook now seeks entry of another order denying the motions based on the interest of justice and newly discovered evidence to facilitate another appeal.

¶5 The circuit court lacked authority to enter another order to facilitate Cook's appeal. Cook could have raised arguments regarding the interest of justice and newly discovered evidence in the State's appeal from the order granting a new trial. *See* ***State v. Alles***, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982). Cook was not required to file a notice of appeal or cross-appeal in order to argue that the circuit court's decision was right for a different reason. Nor was entry of a separate written order required. The final order of November 11, 2010, alluding to the transcripts in which the court previously rejected Cook's other claims, was a final order disposing of those claims. The circuit court had no authority to reenter an order solely for the purpose of facilitating an appeal. ***ACLU v. Thompson***, 155 Wis. 2d 442, 449, 455 N.W.2d 268 (Ct. App. 1990).

¶6 Additionally, Cook cites WIS. STAT. RULE 809.30(7)(i) for the proposition that the circuit court clerk should have entered an order denying the motions when they were not decided within sixty days. These motions were not made under RULE 809.30. Cook's RULE 809.30 rights expired long before these motions were filed.

¶7 Finally, we note the complete lack of arguable merit to the appeal Cook wishes to commence. A new trial in the interest of justice outside of the context of WIS. STAT. § 974.06 is prohibited under ***Henley***, 328 Wis. 2d 544, ¶¶72-77. In the absence of any evidence connecting the glove with Jackson's DNA to the crimes, the DNA match does not meet the test for newly discovered evidence because it is not material to an issue in the case and it is not reasonably probable that a new trial would reach a different result. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.